

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, May 03, 2017

Hearing Room

6C

9:00 AM

8:15-15311 Freedom Communications, Inc.

Chapter 11

Adv#: 8:17-01012 Official Committee of Unsecured Creditors of Freed v. Kushner et al

#1.00

Hearing RE: Defendant Eric Spitz's Motion To Dismiss
(Motion filed 3/14/17) (Joinder In Motion filed 3/13/17)

Docket 15

Tentative Ruling:

APPEARANCES REQUIRED.

Defendant Eric Spitz ("Mr. Spitz") moves to dismiss (the "Motion") the first claim for relief in the complaint (relating to an alleged breach of fiduciary duties) of plaintiff Official Committee of Unsecured Creditors of Freedom Communications, Inc. (the "Committee") against Mr. Spitz and various other defendants, including Aaron Kushner ("Mr. Kushner"). Mr. Kushner joins in the Motion.

The Committee is acting on behalf of three entities: Freedom Communications, Inc. (aka the Orange County Register newspaper), Freedom Communications Holdings, Inc. and 2100 Freedom, Inc. (collectively, "Debtors"). Mr. Spitz is Debtors' former president, and Mr. Kushner is Debtors' former chief executive officer. The complaint filed by the Committee alleges that Mr. Spitz and Mr. Kushner (collectively, "Movants") were trustees of the Retirement Plan of Freedom Communications, Inc. (the "Pension Plan") and wasted millions of dollars of the Pension Plan's assets by improvidently causing the Pension Plan to invest in multimillion dollar life insurance investments. Further, the depletion of the Pension Plan caused an increase in Debtors' contribution obligations with respect to the Pension Plan and the Debtors' liability to the Pension Benefit Guaranty Corporation (the "PBGC"). The Complaint states that "[t]he Committee brings this adversary proceeding to seek redress for the harm the Defendants inflicted on the Debtors and their stakeholders . . ." In the first claim for relief, the Complaint alleges in straightforward fashion that Mr. Spitz and Mr. Kushner owed fiduciary duties to the Debtors to act in their best interests and exercise

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such care as an ordinarily prudent person would use and that they breached those duties, as a result of which Debtors suffered damages.

Movants urge the Court to dismiss the first claim for relief on two grounds: (1) the claim is preempted by Title IV of ERISA; and (2) Movants owed fiduciary duties to the Pension Plan participants and beneficiaries, but not to the Debtors. The Court considers each of these arguments in turn.

**IS THE FIRST CLAIM FOR RELIEF PREEMPTED BY TITLE IV OF
ERISA?**

ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . ." 29 U.S.C. § 1144(a); *Nagrone v. Davis*, 368 Fed. Appx. 743, 745-46 (9th Cir. 2010). The United States Court of Appeals for the Ninth Circuit has formulated a "relationship test" to determine whether ERISA preempts state law. *Nagrone* at 746. ERISA preempts a state law claim under the relationship test if the claim encroaches upon the relationships regulated by ERISA such as plan and plan member, plan and employer and plan and trustee. *Id.*

In the *Nagrone* case, participants in an Employee Stock Ownership Plan and Trust ("ESOP") sued officers and directors of Tidyman's Management Services, Inc., ("TMSI") which appears to have been the ESOP's sponsor. Plaintiff-participants claimed that the defendant officers and directors had violated corporate duties owed to TMSI. The Ninth Circuit held that there was no encroachment on an ERISA-regulated relationship because the relationship between the officers and directors on one hand and TMSI on the other hand is not regulated by ERISA because it involves neither the ESOP nor the ESOP-participant plaintiffs. *Id.*

In the case at bar, the Committee, on behalf of the Debtors, brought this action against Movants and have alleged that Movants violated their fiduciary duties to Debtors. As in *Nagrone*, there is no encroachment on an ERISA-regulated relationship because ERISA does not regulate corporate duties owed by corporate officers and directors to the corporation employing them.

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In an earlier case, the Ninth Circuit reached a similar conclusion that ERISA did not preempt state law. *Abraham v. Norcal Waste Sys.*, 265 F.3d 811 (9th Cir. 2001), *cert. denied*, 537 U.S. 1071 (2002). However, in that case the plaintiffs' complaint (unlike the complaint here) did not facially assert any federal claim and therefore the original subject matter jurisdiction required to support removal existed only if ERISA completely preempted any of the state law claims. *Id.* at 819.

The Court is uncertain as to whether the doctrine of complete preemption described in *Abraham* applies here considering that there is no challenge *per se* in the Motion to this Court's subject matter jurisdiction. As one court has pointed out, removal and preemption are two distinct concepts to which different methods of analysis apply. *Levy v. Chandler*, 287 F.Supp. 2d. 831, 836 (E.D. Tenn. 2003). However, in an abundance of caution, this Court considers application of the complete preemption doctrine here.

Complete preemption applies only when two conditions are satisfied: (1) ERISA expressly preempts the state law cause of action under 29 U.S.C. § 1141(a) ("conflict preemption"); and (2) that cause of action is encompassed by the scope of civil enforcement provision of ERISA, 29 U.S.C. § 1132(a) ("displacement"). *Abraham* at 819. Ultimately, the *Abraham* court found no conflict preemption because the state law claims of fraud, breach of fiduciary duty and negligence arose from the plaintiffs' status as noteholders and did not touch on the status of the ESOP as a benefit plan or of any of the plaintiffs as participants in that plan. *Id.* at 822. By parallel reasoning, there is no conflict preemption here because the state law breach of fiduciary duty claim arises from Debtors' status as employer and does not touch on the status of the Pension Plan as an employee benefit plan or of any of the Debtors as participants in the Pension Plan. The *Abraham* court found no "displacement" because the noteholder-plaintiffs' claims were based upon rights arising under state law, not upon any rights that are conferred, enforced or governed by ERISA. *Id.* at 824-5. By parallel reasoning, there is no "displacement" here because the Debtors' rights as employers of the corporate officer-Movants relating to fiduciary duty and its breach arise under state law, not upon any rights that are conferred, enforced or governed by

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Accordingly, the Committee's breach of fiduciary duty claims against Movants are not preempted.

DO MOVANTS OWE FIDUCIARY DUTIES TO THE DEBTORS?

The fiduciary duties of a corporate officer or director may be parallel to the duties entrusted to an ERISA plan fiduciary (or an ERISA trustee), but these duties exist independently from the plan itself. *Nagrone v. Davis, supra*, 368 Fed. Appx. at 746; *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1468-69 (5th Cir. 1986). In other words, Movants, each wearing two hats – officer of Debtors and Pension Plan trustee – had two sets of independent duties: duties to the Debtors and duties to the Pension Plan and its participants and beneficiaries. The existence of their duties as Pension Plan trustees did not make their duties as corporate officers of the Debtors disappear. See also *In re the Antioch Company*, No. 3:10-CV-156, 2011 WL 3664564 at *2 (S.D. Ohio Aug. 12, 2011) ("The Bankruptcy Court properly found that [corporate officers] Morgan, Moran, and Attiken could not abdicate their fiduciary duties to the Company by simultaneously and voluntarily assuming fiduciary duties under ERISA").

Movants owed fiduciary duties to the Debtors, and their status as trustee of the Pension Plan did not relieve them of such duties.

**HAS THE COMMITTEE PLED ADEQUATE FACTS TO MAKE OUT A
BREACH OF FIDUCIARY DUTY CLAIM AGAINST MOVANTS?**

The Committee's complaint alleges that Movants caused the Pension Plan to make very bad investments in life insurance products that resulted in large financial losses by the Pension Plan, thereby increasing Debtors' funding obligations to the Pension Plan and later resulting in a large liability of the Debtors to the PBGC. Importantly, the complaint supplies abundant detail about the history of these investments, an allegation that Aon Hewitt, the Pension Plan's investment advisory and actuarial firm, opined in writing that the life insurance investments were not suitable for a pension

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plan. These are adequate facts to make out a breach of fiduciary claim in the context of a motion to dismiss.

MOVANTS' ARGUMENTS IN THEIR REPLY

Movants state in their reply (giving effect to Mr. Kushner's joinder in the reply) that they owe separate and distinct fiduciary duties to the Debtors and the Pension Plan. The Court agrees with this statement to the extent that it implies they owed one set of duties to the Debtors and another set of duties to the Pension Plan, and allowing for the possibility that some of these duties might essentially be the same in each case – because that is the situation here. One of their duties to the Pension Plan was, in general terms, to cause the Pension Plan to invest in assets that would appreciate in value and make the Pension Plan prosper. Wearing their Debtors hats, they also owed a parallel duty to the Debtors to see to it that the Pension Plan would prosper so that the Debtors' funding obligations to the Plan would not skyrocket by reason of a diminution in value of the Pension Plan's assets. It was this duty to the Debtors that the complaint alleges was breached. As the discussion above shows, this states a good cause of action.

For the foregoing reasons, the Motion is denied with prejudice.

RESPONDENT TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

Freedom Communications, Inc.

Represented By

William N Lobel

Beth Gaschen

Alan J Friedman

Christopher J Green

Caroline Djang

Scott D Fink

Reed M Mercado

Defendant(s):

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C2 Advisors, LLC

Represented By
Robert S Marticello

C & C Marketing LLC

Represented By
Robert S Marticello

Etaros Actuarial Services LLC

Represented By
Robert S Marticello

JTR, LLC

Represented By
Robert S Marticello

Financial Institution Consulting

Represented By
Lewis R Landau

Eric Spitz

Represented By
Christopher B Queally
James M Sabovich

Aaron Kushner

Represented By
Steven B Sacks

Richard J. Covelli

Represented By
Robert S Marticello

Larry P. Chinn

Represented By
Lewis R Landau

Traci M. Christian

Represented By
Robert S Marticello

Movant(s):

Eric Spitz

Represented By
Christopher B Queally
James M Sabovich

Plaintiff(s):

Official Committee of Unsecured

Represented By
Alan J Kornfeld

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Hearing Room 6C

9:00 AM

8:15-15640 Jose Jesus Hernandez

Chapter 7

Adv#: 8:16-01053 AmTrust Financial Servies Inc., as administrator o v. Hernandez et al

#2.00

CONT'D PRE-TRIAL CONFERENCE Hearing RE: First Amended Complaint
For Breach Of Contract; Fraud And Deceit [Including Violation Of Insurance
Code Section 11760 By Civil Conspiracy]
(Notice of Removal filed 2/22/16)
(PTC set at S/C held 4-27-16)

FR: 4-27-16; 2-8-17

Docket 0

Tentative Ruling:

APPEARANCES NOT REQUIRED.

Continue the hearing to July 26, 2017 at 9:00 a.m.

Plaintiff shall file a settlement stipulation and lodge an order thereon on or before
May 31, 2017 .

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Jose Jesus Hernandez

Represented By
Terrence J Moore

Defendant(s):

JCH General Construction Inc.

Pro Se

JHE Construction Inc.

Pro Se

Jose Jesus Hernandez

Represented By
Terrence J Moore

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CONT... Jose Jesus Hernandez

Chapter 7

Plaintiff(s):

AmTrust Financial Servies Inc., as

Represented By
Timothy C Aires

Trustee(s):

Jeffrey I Golden (TR)

Pro Se

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9:00 AM

8:16-10169 Michael Edward Kelly and Alice Teresa Kelly

Chapter 11

#3.00

CONT'D STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case;
And (2) Requiring Report On Status Of Chapter 11 Case
(Petition filed 1/15/16)

FR: 3-16-16; 8-3-16; 9-28-16; 1-18-17; 2-15-17

Docket 1

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will inquire into compliance with United States Trustee guidelines and requirements.

Next status conference: July 5, 2017 at 9:00 a.m.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Michael Edward Kelly

Represented By
Christopher C Barsness

Joint Debtor(s):

Alice Teresa Kelly

Represented By
Christopher C Barsness

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Wednesday, May 03, 2017

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9:00 AM

8:16-10333 Tai Xu Song

Chapter 7

Adv#: 8:16-01115 Lee v. Song

#4.00

Hearing RE: Motion For Reconsideration RE Order Granting Judgment Of Dismissal Dated March 17, 2017
(Motion filed 3/22/17)

Docket 17

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will continue this matter to June 28, 2017 at 9:00 a.m. for an evidentiary hearing at which Mr. Langer will be given an opportunity to corroborate and substantiate his claims of illness during the period of February 13, 2017 to March 1, 2017. Such substantiation and corroboration may take the form of doctor's bills, hospital admission, purchase of drugs, etc. and may include records going back as far as two years. Mr. Langer is required to personally appear at this hearing and be subject to cross-examination.

Plaintiff's brief, declaration(s) and exhibits are due May 24, 2017. Defendant's response is due June 14, 2017.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Tai Xu Song

Represented By
Jae Y Kang

Defendant(s):

Tai Xu Song

Represented By
John J Oh

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CONT... Tai Xu Song

Chapter 7

Movant(s):

Ji Hyun Lee

Represented By
David Marh
David Marh

Plaintiff(s):

Ji Hyun Lee

Represented By
David Marh

Trustee(s):

Richard A Marshack (TR)

Pro Se

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Santa Ana
Judge Mark Wallace, Presiding
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9:00 AM

8:16-13380 Eric Martinson

Chapter 11

#5.00

CONT'D STATUS CONFERENCE Hearing RE: (1) Status of Chapter 11 Case;
And (2) Requiring Report On Status Of Chapter 11 Case
(Petition filed 8/9/16)

FR: 10-12-16; 11-9-16; 2-15-17

Docket 8

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will inquire into compliance with United States Trustee guidelines and requirements.

Sua sponte, the Court will extend the deadline for filing a plan and disclosure statement to September 30, 2017 and the deadline for confirming a plan to December 15, 2017.

Next status conference: September 27, 2017 at 9:00 a.m.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Eric Martinson

Represented By
Richard Lynn Barrett

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Hearing Room 6C

9:00 AM

8:16-14396 Madhulika Baid

Chapter 11

#6.00

STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case; And (2)
Requiring Report On Status Of Chapter 11 Case
(Chapter 13 Petition filed on 10/25/16)
(Case Converted to Chapter 11 on 11/28/16))

Docket 0

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will inquire into compliance with United States Trustee guidelines and requirements and ask Debtor's counsel to give the Court a brief overview of this case.

Next status conference: TBD

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Madhulika Baid

Represented By
Michael R Totaro

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Hearing Room 6C

9:00 AM

8:16-14461 Blue Light Capital Corp

Chapter 11

#7.00

CONT'D STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case;
And (2) Requiring Report On Status Of Chapter 11 Case
(Petition filed 10/28/16)

FR: 2-8-17

Docket 1

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will inquire into (1) compliance with United States Trustee guidelines and requirements and (2) the current status of sales efforts.

Next status conference: August 30, 2017 at 9:00 a.m.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Blue Light Capital Corp

Represented By
Alan M Lurya

**United States Bankruptcy Court
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Wednesday, May 03, 2017

Hearing Room 6C

9:00 AM

8:16-12794 DuBy Industrial One, LLC, a California limited lia

Chapter 11

Adv#: 8:17-01023 DuBy Industrial One LLC v. Goldenwest Laundry and Valet Services Inc et

#8.00

Hearing RE: Motion For Order RE: Plaintiff/Debtor-in-Possession's Motion To Dismiss Defendant/Counter-Claimant's Amended Counterclaim RE FRCP 12(b)(1), 12(b)(2), And/Or 12(b)(6) / Federal Rules Of Bankruptcy Procedure 7012 RE: Failure To State A Claim For Relief (ECF No. 10) (Moton filed 4/11/17)

Docket 23

Tentative Ruling:

APPEARANCES REQUIRED.

Grant Debtor's request for judicial notice.

Grant the motion to dismiss counterclaim with leave to amend no later than September 3, 2017. Debtor's answer to the counterclaim as a whole is due 21 days after Goldenwest and Schley file an amended counterclaim, but no later than September 24, 2017.

DEBTOR TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

DuBy Industrial One, LLC, a

Represented By
Thomas J Polis

Defendant(s):

Ezra Schley

Represented By
Vanessa M Haberbush

Goldenwest Laundry and Valet

Represented By
Vanessa M Haberbush

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CONT... DuBy Industrial One, LLC, a California limited lia

Chapter 11

Plaintiff(s):

DuBy Industrial One LLC

Represented By
Thomas J Polis

**United States Bankruptcy Court
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9:00 AM

8:16-12794 DuBy Industrial One, LLC, a California limited lia

Chapter 11

Adv#: 8:17-01023 DuBy Industrial One LLC v. Goldenwest Laundry and Valet Services Inc et

#9.00

Hearing RE: Motion By The Byran Company, Inc. And Byran Company To Dismiss First Amended Third-Party Complaint For Failure To State A Claim Upon Which Relief Can Be Granted
Federal Rules of Civil Procedure 12(b)(6); Bankruptcy Rules of Procedure 7012]
(Motion filed 4/12/17)

Docket 26

Tentative Ruling:

APPEARANCES REQUIRED.

Grant and dismiss with leave to amend on or before September 3, 2017, with an answer due on or before September 24, 2017 but no later than 21 days after an amended complaint is filed.

The negligence claim will not be dismissed because it is a question of fact and law as to when the claim accrued for statute of limitations purposes. Movants have not made a sufficient showing as to the other grounds they argue are bases for dismissing the complaint.

RESPONDENTS TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

DuBy Industrial One, LLC, a

Represented By
Thomas J Polis

Defendant(s):

Ezra Schley

Represented By
Vanessa M Haberbush

Goldenwest Laundry and Valet

Represented By

**United States Bankruptcy Court
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CONT...

DuBy Industrial One, LLC, a California limited lia

Vanessa M Haberbush

Chapter 11

Plaintiff(s):

DuBy Industrial One LLC

Represented By
Thomas J Polis

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8:16-12794 DuBy Industrial One, LLC, a California limited lia

Chapter 11

Adv#: 8:17-01023 DuBy Industrial One LLC v. Goldenwest Laundry and Valet Services Inc et

#10.00

STATUS CONFERENCE Hearing RE: Debtor-In-Possession's Complaint For Turnover For:

1. Unpaid Rent Charges And Related Expenses;
2. Response Costs Pursuant To The Comprehensive Environmental; Response, Compensation, And Liability Act ("CERCLA"), 42 U.S.C. Section 9607;
3. Declaratory Relief Pursuant To CERCLA, 42 U.S.C. Section 9613;
4. Abatement Of Imminent And Substantial Endangerment, Resource Conservation And Recovery Act, 42 U.S.C. Section 6901, et seq;
5. Breach Of Contract; And
6. Reimbursement For Reasonable Attorneys Fees And Costs (Complaint filed 2/13/17)

Docket 1

***** VACATED *** REASON: CONTINUED TO MAY 31, 2017 AT 9:00 A.M. PER ANOTHER SUMMONS ISSUED 3-16-17 - [Docket No. 8]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

DuBy Industrial One, LLC, a

Represented By
Thomas J Polis

Defendant(s):

Ezra Schley

Represented By
Vanessa M Haberbush

Goldenwest Laundry and Valet

Represented By
Vanessa M Haberbush

Plaintiff(s):

DuBy Industrial One LLC

Represented By

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DuBy Industrial One, LLC, a California limited lia
Thomas J Polis

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Chapter 11

Adv#: 8:17-01023 DuBy Industrial One LLC v. Goldenwest Laundry and Valet Services Inc et

#11.00

Hearing RE: Motion To Dismiss Adversary For Failure To State A Claim Upon
Which Relief Can Be Granted
[Federal Rules Of Civil Procedure 12(b)(6)]
[Bankruptcy Rule Of Procedure 7012]

Docket 15

***** VACATED *** REASON: OFF CALENDAR - NOTICE OF
WITHDRAWAL FILED 4-7-17 - [Docket No. 18]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

DuBy Industrial One, LLC, a

Represented By
Thomas J Polis

Defendant(s):

Ezra Schley

Represented By
Vanessa M Haberbush

Goldenwest Laundry and Valet

Represented By
Vanessa M Haberbush

Movant(s):

Bryan Company

Represented By
Jeffrey Lewis

The Byran Company, Inc.

Represented By
Jeffrey Lewis

Plaintiff(s):

DuBy Industrial One LLC

Represented By
Thomas J Polis

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8:16-12794 DuBy Industrial One, LLC, a California limited lia

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Adv#: 8:17-01023 DuBy Industrial One LLC v. Goldenwest Laundry and Valet Services Inc et

#12.00

Hearing RE: Motion For Order RE: Plaintiff/Debtor-In-Possession's Motion To Dismiss RE FRCP 12(b)(1), 12(b)(2), And/Or 12(b)(6)/ Federal Rules Of Bankruptcy Procedure 7012 RE: Failure To State A Claim For Relief (Motion filed 4/5/17)

Docket 13

***** VACATED *** REASON: OFF CALENDAR - VOLUNTARY
WITHDRAWAL OF MOTION FILED 4-11-17 - [Docket No. 22]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

DuBy Industrial One, LLC, a

Represented By
Thomas J Polis

Defendant(s):

Ezra Schley

Represented By
Vanessa M Haberbush

Goldenwest Laundry and Valet

Represented By
Vanessa M Haberbush

Plaintiff(s):

DuBy Industrial One LLC

Represented By
Thomas J Polis

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8:16-14883 Se Y Oh

Chapter 11

#13.00

CONT'D STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case;
And (2) Requiring Report On Status Of Chapter 11 Case
(Petition filed 11/30/16)

FR: 2-8-17

Docket 0

***** VACATED *** REASON: OFF CALENDAR - ORDER DISMISSING
CASE ENTERED 4-18-17 - [Docket No. 45]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Se Y Oh

Represented By
Stephen R Wade